Section 24(2) of the *Charter*; Exploring the Role of Police Conduct in the *Grant* Analysis

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ABSTRACT

This article explores the role of the police conduct inquiry in the application of s. 24(2) of the *Canadian Charter of Rights and Freedoms* under the *Grant* analysis from *R v Grant*. It argues, based on the author's research, that the first line in the *Grant* analysis, namely the police conduct inquiry, has become the determinative factor in the *Grant* analysis. The article further argues that the concept of good faith policing is being unevenly and inconsistently applied. Good faith policing has never been clearly defined, yet it plays a significant role in the police conduct inquiry. This is dangerous as it gives rise to scenarios where the concept of good faith policing captures a broad scope of conduct. As a result, evidence is sometimes being admitted, when it otherwise would have been excluded.

***Keywords*:** Exclusion of evidence; *Canadian Charter of Rights and Freedoms*; Evidence; Policing; Good Faith Policing; Section 24(2); Criminal Law; Constitutional Law; *R v Grant*; *Grant* analysis; Administration of Justice

> "I fail to see how the good faith of the investigating officer can cure an unfair trial..." Sopinka J. in R v Hebert [1990] 2 SCR 151
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> "The good faith of the police will not strengthen the case for admission to cure an unfair trial. The fact that the police thought they were acting reasonably is cold comfort to an accused if their actions result in a violation of his or her rights to fair criminal process..." Iacobucci J. in R v Elshaw [1991] 3 SCR 24

I. INTRODUCTION AND BACKGROUND

Section 24(2) of the *Canadian Charter of Rights and Freedoms*[1] is an important, yet contentious provision in our *Charter*. It is contentious because it can deprive the court of crucial evidence. It is important because it is a significant remedy available to an accused whose rights have been infringed. Bearing this in mind, it is imperative that s. 24(2) be accompanied by clear guidelines in order to ensure that evidence is excluded in appropriate circumstances. The Supreme Court has been tasked with determining how s. 24(2) should be interpreted and applied. The Supreme Court's most recent major comment on this provision was in 2009 when the Court rendered its decision in *R v Grant*.[2]

The decision in *Grant* afforded courts with a framework that requires judges to consider three separate independent factors when determining whether to exclude illegally obtained evidence.[3] This framework is known as the *Grant* analysis. In *Grant*, and in subsequent decisions, the Supreme Court has been unequivocally clear that all three factors of the analysis must be balanced against one another.[4] The Court further held that one factor should never be determinative over the others.[5] In other words, one factor should never trump the others. This article argues that the most important factor in the *Grant* analysis is the first factor, namely the police conduct inquiry. This part of the analysis invites judges to assess the police conduct associated with the *Charter* breach. The significance of the police conduct inquiry is an important concept which this article attempts to address.

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1 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 [*Grant*].

3 The three factors judges are required to consider are (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the rights of the accused, and (3) society's interest in the adjudication of the case on its merits. See *ibid* at para 71. These factors will be discussed later in this paper.

4 *Ibid* at para 86.

5 *R c Côté,* 2011 SCC 46 at para 48, [2011] 3 SCR 215.

This article argues that the *Grant* framework is being unevenly applied. It argues that the police conduct inquiry in the *Grant* analysis appears to have become the determinative factor in the *Grant* analysis. This goes against the instructions set out by the Supreme Court in *Grant* which require that all three factors be balanced together. The police conduct inquiry under the *Grant* analysis tends to determine whether evidence will be excluded. In other words, the test for determining whether evidence should be excluded currently revolves primarily around the police conduct inquiry.

The concept of good faith policing plays a vital role in the police conduct inquiry. This article will argue that the lack of a clear definition for the concept of good faith policing is problematic. The concept of good faith policing and its application to the *Grant* framework is the main focus of this article. The Supreme Court has given minimal guidance on the application of the concept of good faith policing; there is no clear definition of what types of conduct fall within the scope of good faith policing. The result is that good faith policing is receiving inconsistent application.[6] This has led some courts to mistakenly label negligent or reckless police conduct as good faith policing[7]. As a result, evidence is being admitted when it perhaps ought to be excluded.

This article argues that it is perilous for the police conduct inquiry to be the determinative factor in the *Grant* analysis when the concept of good faith policing, a concept which plays a substantial role in the police conduct inquiry, has not been properly defined. It creates the risk that police conduct will falsely be captured by the concept of good faith policing and will lead to the admission of evidence which may have otherwise been excluded. This is a core issue this article seeks to address.

The arguments made will be supported by the author's research. The research consists of an analysis of one hundred decisions from the year 2016 in which s. 24(2) of the *Charter* as well as the *Grant* analysis were considered and applied. The methodology used will be explained later in this article.

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6 Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2016) (release number 28) at 10-58.1; see also Steve Coughlan, "Common Law Police Powers and Exclusion of Evidence: The Renaissance of Good Faith" (2006), 36 CR (6th) 353.

7 Examples of such cases will be discussed throughout this paper.

This article begins by giving the reader a brief overview of the exclusion of evidence in Canada, as well as the police conduct inquiry. It reveals the current and historical importance of the police conduct inquiry. Part III then briefly summarizes the current approach to the concept of good faith policing. Part IV discusses the author's research, which is used to support the main arguments this article attempts to make. This article concludes with some remarks and recommendations.

II. THE EXCLUSION OF EVIDENCE IN CANADA

The law surrounding the exclusion of evidence in Canada has changed drastically over time. Prior to the enactment of the *Charter*, Canadian judges were reluctant to exclude evidence obtained illegally or in violation of a person's rights under the Canadian Bill of Rights 1960.[8] Unlike the *Charter*, the Bill of Rights did not include an exclusionary remedy. In 1971, the Supreme Court held that a judge did not have the discretion to exclude evidence obtained in breach of a person's rights.[9] Therefore, as long as the evidence was relevant, illegally obtained evidence was admissible.

The manner in which the evidence was obtained was irrelevant to the determination of its admissibility. A somewhat vivid and startling example of this pre-*Charter* law was displayed in *R v Devison*,[10] where the Nova Scotia Court of Appeal stated, "Even if he (the accused) had been knocked down and beaten and the blood sample extracted from him, it would still be admissible."[11] This bright line rule was subject only to the narrow and seldom used exception that gave judges the discretion to exclude evidence that would be "gravely prejudicial" to the accused.[12] This rigid and inflexible

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8 See, for example, *R v Wray*, [1971] SCR 272, [1970] SCJ No 80 (QL) [*Wray*], where the Supreme Court of Canada followed *Kuruma v the Queen*, [1955] AC 197, [1955] 2 WLR 223.

9 *Wray, supra* note 8; *Hogan v The Queen*, [1975] 2 SCR 574, 18 CCC (2d) 65 [*Hogan*]; see also Peter W Hogg, *Constitutional Law of Canada*, 2016 student ed (Toronto: Thomson Reuters, 2016) at 41.2 [*Hogg*].

10 *R v Devision* (1974), 21 CCC (2d) 225, 10 NSR (2d) 482.

11 *Ibid* at 230.

12 *Wray, supra* note 8; *R v Rothman*, [1981] 1 SCR 640, [1981] SCJ No 55 (QL); *Hogan, supra* note 9; see also David Stratas, "The Law of Evidence and the *Charter*" in The Law Society of Upper Canada, ed, *Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2003) at 277–278.

rule heavily disregarded individual rights – the police were essentially free to collect evidence by whatever means necessary. Naturally, this led to much discontent amongst the community.[13] The court's search for the truth trumped any interest in procedural fairness or in protecting the rights of an accused; it was truth over fairness.[14] This evidently explains the Supreme Court's reluctance to allow judges to exclude illegally obtained evidence.

During the rights revolution, while the government of Canada was drafting the *Charter*, there was much debate surrounding the exclusion of evidence. Some lobbied for the American exclusionary rule.[15] Others felt that it was more appropriate to discipline the police officers separately and to allow the admission of the evidence in order to convict the guilty and stay true to the Court's search for the truth.[16] The final outcome was a compromise between the two schools of thought.[17] The framers of the *Charter* provided Canadians with s. 24(2) of the *Canadian Charter of Rights and Freedoms*.[18] Section 24(2) requires a judge to exclude evidence obtained

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13 John Sopinka et al, *The Law of Evidence in Canada*, 4th student ed (Markham: LexisNexis Canada, 2014) at 572.

14 Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999). This article was located in Kent Roach's book, *Criminal Law and Procedure: Cases and Materials*, 11th ed (Toronto: Emond Montgomery, 2015) at 130–134.

15 Generally, illegally obtained evidence is automatically excluded. See *Weeks v US*, 34 S Ct 341 (1914); *Mapp v Ohio,* 367 US 643 (1961); *Elkins v United States*, 364 US 206 at 217 (1960), EG Ewaschuk, QC, "Search and Seizure: Charter Implications" (1982), 28 CR (3d) 153; however, the absolute exclusionary rule in the United States may be changing, see *US v Herring,* 129 S Ct 695 (2009).

16 *Hogg, supra* note 9 at 41–42.

17 See the judgment of Dickson CJ in *R v Simmons* (1989), 45 CCC (3d) 296, [1988] 2 SCR 495 at 323, where he states, "The *Charter* enshrines a position with respect to evidence obtained in violation of *Charter* rights that falls between two extremes. Section 24(2) rejects the American rule that automatically excludes evidence obtained in violation of the Bill of Rights. It also shuns the position at common law that all relevant evidence is admissible no matter how it was obtained." See also Gerard E Mitchell, "The Supreme Court on Excluding Evidence Under the Charter" (1992), 70 CR (3d) 118.

18 Section 24(2) of the *Charter* states, "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

in a manner[19] that breached a person's *Charter* rights, if the admission of the evidence *could*[20] bring the administration of justice into disrepute. The enactment of s. 24(2) fundamentally changed the law of evidence.[21]

Over time, the Supreme Court has consistently contributed to the development of s. 24(2). The Court's most recent major comment on the s. 24(2) framework was set out in its 2009 decision in *Grant*.[22] McLachlin C.J. and Charron J., writing for the Court in *Grant*, set out the current framework for the exclusion of evidence:

> When faced with an application for exclusion under s.24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admissions may send the message that the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interest of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. [23]

The Court's primary concern was to ensure that evidence would only be excluded if its admission would bring the administration of justice into disrepute.[24] The Court further emphasized that courts must be concerned

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19 In *R v Strachan*, [1988] 2 SCR 980, 56 DLR (4th) 673, and *R v Debot*, [1989] 2 SCR 1140, 52 CCC (3d) 193, the Supreme Court took a generous approach to the words "obtained in a manner" and required that there must be a "temporal" and not "causal" connection between the obtainment of the evidence and the *Charter* breach. Dickson CJ stated that the trial judge must look at the "entire chain of events" and that a temporal link between the *Charter* breach and the obtainment of evidence will suffice. This concept was most recently affirmed by the Ontario Court of Appeal in *R v Pino*, 2016 ONCA 389 at para 56, 2016 CarswellOnt 8004, where Laskin JA affirmed that the approach must be generous, temporal, and contextual.

20 The actual wording of section 24(2) is "would" and not "could"; however, in *R v Collins*, [1987] 1 SCR 265, at 287–288, [1987] SCJ No 15 (QL) [*Collins*], Lamer J looked at the French reading of section 24(2) and determined that the provision should thus be read as "the evidence shall be excluded if it is established that having regard to all the circumstances, admission of it in the proceedings *could* bring the administration of justice into disrepute" [emphasis in original].

21 See generally *Stratas*, *supra* note 12.

22 *Grant*, *supra* note 2.

23 *Ibid* at para 71.

24 *Ibid* at paras 67–70.

about the long-term repute of the administration of justice and not its short-term repute.[25]

Many Canadian academics commended and welcomed the new framework.[26] Following the decision in *Grant*, many scholars predicted that the new framework would lead to much lower rates of exclusion.[27] The general consensus was that there would be higher rates of admission due to the fact that judges now had to adopt a more contextual and principled approach. Despite these predictions, the truth is, no one knew what the outcome would be. This is because the *Grant* framework is somewhat unclear and unpredictable. The framework demands a complete contextual analysis. It requires judges to balance all of the three factors in order to come to a conclusion on whether to exclude the evidence.[28] However, the

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25 *Ibid* at para 68. The court emphasized that their main concern was the long-term repute of the administration of justice. At paragraph 68, the court stated, "The phrase 'bring the administration of justice into disrepute' must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute."

26 See RJ Delisle et al, *Evidence: Principles and Problems*, 10th ed (Toronto: Carswell, 2012) at 205; Don Stuart, *Charter Justice in Canadian Criminal Law*, 10th ed (Toronto: Carswell, 2010) at 595–597; Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Toronto: LexisNexis Canada, 2011) at 557–573.

27 For example, see David M Paciocco & Lee Stuesser, *The Law of Evidence* 5th ed (Toronto: Irwin Law, 2008) (revised 2009) at 38; Mike Madden, "Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of *R v Grant*" (2011) 15:2 CCLR 229 [*Madden*]; see also Don Stuart, "Welcome Flexibility and Better Criteria from the Supreme Court of Canada for Exclusion of Evidence Obtained in Violation of the Canadian Charter of Rights and Freedoms" (2010) 16 SW J Int'l L 313 at 326; Tim Quigley, "Was It Worth the Wait? The Supreme Court's New Approaches to Detention and Exclusion of Evidence" (2009), 66 CR (6th) 88 at 94. These academics all made very similar predictions regarding an increase in the admission of evidence after *Grant*.

28 *Grant*, *supra* note 2 at para 71.

predictions of lower rates of exclusions were proven wrong; since *Grant*, Canada continues to have high rates of exclusion.[29]

Some academics were not as receptive to the new *Grant* framework. Paciocco (now Justice Paciocco) showed understandable concern about the complete discretion awarded to trial judges under the new framework.[30] In *Grant*, McLachlin C.J. and Charron J. attempted to address some of these concerns by stating that "patterns" would emerge through the common law which would help restore certainty in the s. 24(2) analysis.[31] The Court may have been aware that the prior jurisprudence provided a degree of certainty in relation to the application of s. 24(2).[32] It seems the Court was hoping that the new framework would slowly adopt a degree of certainty over time through the common law.

For the purposes of this article, it is important to consider the first factor in the *Grant* analysis. The first factor in the *Grant* analysis requires a judge to assess the *Charter* infringing state conduct. This commonly invites judges to look into the police conduct surrounding the *Charter* breach. The police conduct inquiry is not new to the s. 24(2) analysis. Many of the very early s. 24(2) decisions took into account the conduct of the police when determining whether to admit or exclude evidence.[33] Following the enactment of the *Charter*, when considering whether to exclude evidence under s. 24(2), judges consistently applied the "shock the community" test.[34] Put simply, courts would consider whether the admission of the impugned

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29 This will be further discussed in part IV of this paper, where the author reviews some of the past empirical statistics relating to the rates of exclusion under the *Grant* framework.

30 David M Paciocco, "Section 24(2): Lottery or Law – The Appreciable Limits of Purposive Reasoning" (2011) 58 Crim LQ 15.

31 *Grant*, *supra* note 2 at para 86.

32 For example, under the previous *Collins/Stillman* framework developed in *R v Stillman*, [1997] 1 SCR 607, 144 DLR (4th) 193, following the Supreme Court's decision in *Collins*, the Supreme Court created the conscriptive evidence rule. This rule required judges to automatically exclude all illegally obtained conscriptive evidence. As a result, this ensured a high degree of certainty within the section 24(2) analysis when it came to conscriptive evidence.

33 For an excellent general overview of the early case law and the several early decisions released around the country, as well as the general history of section 24(2), see James A Fontana & David Keeshan, *The Law of Search and Seizure in Canada*, 9th ed (Toronto: LexisNexis Canada, 2015) at 1086–1096.

34 *Ibid* at 1093.

evidence would shock the ordinary man.[35] Naturally, this assessment required courts to consider the conduct of the police officers.[36] The police conduct inquiry has thus always played a vital role in the application of s. 24(2).

III. SERIOUSNESS OF THE *CHARTER* INFRINGING STATE CONDUCT

The police conduct inquiry, under the first factor of the *Grant* analysis, plays a very important part in the overall analysis. This factor appears to be the most determinative factor in the *Grant* analysis. As noted, it requires judges to consider the seriousness of the *Charter* infringing state conduct. In other words, the first branch of the *Grant* analysis inescapably requires judges to assess the conduct of the police at the time the *Charter* breach crystallized.[37] As noted, the conduct of the police officers in obtaining the evidence has always been a crucial part of a judge's analysis when deciding whether to exclude evidence.

The reason judges must consider the conduct of the police is due to the fact that the Canadian justice system must disassociate itself from unlawful police conduct.[38] By excluding evidence, Canadian courts send a clear message that they do not condone state conduct in which police officers do not comply with the *Charter* rights of Canadians.[39] Therefore, serious breaches favour the exclusion of evidence under this branch of the analysis. Minor breaches tend to favour admission because they lessen the need for courts to disassociate themselves from the unlawful police conduct. Judges must be cognizant of the fact that the inquiry into police conduct is only one part of the analysis; judges must still balance all three factors of the *Grant* analysis against one another and one factor must never trump the others.[40]

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35 *Ibid* at 1086–1096.

36 *Ibid*.

37 *Roach*, *supra* note 6 at 10-45 (para 10.1050).

38 *Grant*, *supra* note 2at para 72.

39 *Ibid*.

40 *Grant*, *supra* note 2 at para 86; *Côté*, *supra* note 5 at para 48.

The Supreme Court in *Grant* stated that the first factor in the *Grant* analysis was not concerned with deterrence or with punishing the police for not complying with the *Charter*.[41] The Court explained that this branch of the analysis was concerned with ensuring that courts were disassociating themselves with *Charter* infringing state conduct in order to maintain the repute of the administration of justice and upholding public confidence.[42] As Lamer J. stated in *Collins*, "it is not open to the courts in Canada to exclude evidence to discipline the police, but only to avoid having the administration of justice brought into disrepute."[43] The Court in *Grant* did acknowledge that it was perhaps a "happy consequence" that *Charter* infringing police conduct would be deterred due to the risk of exclusion.[44]

The Supreme Court held that judges must evaluate the conduct of the police and place it on a spectrum. In essence, the Court held that judges must determine whether the conduct of the police was "committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, willful or flagrant."[45] McLachlin CJ and Charron J. stated the following:

> "State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a willful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute."[46]

In *R v Harrison*,[47] a decision released by the Supreme Court with *Grant*, the Supreme Court stated, "police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights. What is important is the proper

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41 *Grant*, *supra* note 2 at para 73.

42 *Ibid.*

43 *Collins*, *supra* note 20 at 518–519.

44 *Grant*, *supra* note 2 at para 73.

45 *Collins*, *supra* note 20 at 527.

46 *Grant*, *supra* note 2 at para 74.

47 *R v Harrison*, 2009 SCC 34, [2009] 2 SCR 494.

placement of the police conduct along that fault line, not the legal label attached to the conduct."[48]

In *Grant*, the Supreme Court provided judges with further guidance in relation to the police conduct spectrum. The Court stated that breaches committed in good faith would lessen the need for Canadian courts to disassociate themselves with unlawful police conduct.[49] The result is that *Charter* breaches committed in good faith tend to favour admission. However, the Court offered an important caveat. McLachlin CJ and Charron J. restricted the application of the good faith policing by stating that "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or willful blindness cannot be equated with good faith."[50]

The concept of good faith policing is one of the focal points of this article. Put simply, police conduct equating to good faith is found primarily where an officer holds an honest and reasonable belief that their actions are lawful.[51] It is important that negligent or reckless police conduct not be mischaracterized as good faith policing.[52]

Good faith policing is often found when the police rely on legal authority to justify their actions.[53] A recurring theme of good faith policing in relation to s. 8 breaches is found when the police honestly and reasonably believed that the illegal search performed was authorized by a valid search warrant.[54] For example, where a warrant includes minor inadvertent errors, it may be invalid; if the police performed the search due to an honest and reasonable belief that it was valid, then their conduct may be labeled as good faith policing. Another common example of good faith policing is where there is confusion in the law relating to police powers incident to arrest. The latter example has been the subject of many Supreme Court decisions in the last five years.[55] Put simply, if the confusion in the law is such that an

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48 *Ibid* at para 23.

49 *Grant*, *supra* note 2 at para 75.

50 *Ibid*; see also *R v Genest*, [1989] 1 SCR 59 at 87, [1989] SCJ No 5 (QL) [*Genest*]; *R v Kokesch*, [1990] 3 SCR 3, [1990] SCJ No 117 (QL) [*Kokesch*].

51 *R v Caron*, 2011 BCCA 56 at para 38, [2011] BCWLD 2263.

52 *Grant*, *supra* note 2 at para 75.

53 *Roach*, *supra* note 6 at 10-48–10-58.1.

54 *Ibid*.

55 See e.g. *R v Cole*, 2012 SCC 53, 3 SCR 34 [*Cole*]; *R v Aucoin*, 2012 SCC 66, [2012] 3 SCR 408 [*Aucoin*]; *R v Vu*, 2013 SCC 60, [2013] 3 SCR 657 [*Vu*]; *R v Spencer*, 2014 SCC

officer may have honestly and reasonably believed their actions were lawful, they may be found to have been acting in good faith.[56]

It is helpful to consider a statement by Ryan J.A. in *R v Washington*[57] where he summarizes the law of good faith policing, but also identifies the incomplete definition of good faith policing. He states that "Although good faith is not fully defined in the jurisprudence, the underlying notion is that good faith is present when the police have conducted themselves in manner that is consistent with what they subjectively, reasonably and non-negligently believe to be the law."[58] It is important to also acknowledge Ryan J.A.'s admission that good faith policing is not fully defined. As will be argued in this article, this can be problematic.

By way of example, in *R v Saeed*,[59] Karakatsanis J., in a concurring judgment, found the seriousness of the officer's conduct to be lessened when, incident to arrest the officer obtained a genital swab from the accused without the consent of the accused or a warrant. Karakatsanis J. opined that, although this was an unreasonable search under s. 8 of the *Charter*, the officer's conduct did not favour exclusion because there was significant confusion in the law relating to the power of police to obtain genital swabs incident to arrest.[60]

In *R v Fearon*[61] the Supreme Court admitted illegally obtained evidence from the accused's cell phone. The police unlawfully searched the cell phone of the accused incident to arrest. The Court found that the breach was committed in good faith due to the uncertainty in the law relating to the police powers to search a cell phone incident to arrest. In *Fearon*, the Court acknowledged that there were two conflicting appellate authorities in Canada relating to the police powers to search cell phones incident to

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43, [2014] 2 SCR 212 [*Spencer*]; *R v Fearon,* 2014 SCC 77, [2014] 3 SCR 621 [*Fearon*]; *R v Saeed,* 2016 SCC 24, [2016] 1 SCR 518 [*Saeed*].

56 *Vu*, *supra* note 55 at paras 69 and 71.

57 *R v Washington*, 2007 BCCA 540, 248 BCAC 65.

58 *Ibid* at para 78.

59 *Saeed*, *supra* note 55.

60 *Ibid* at 126.

61 *Fearon*, *supra* note 55.

arrest.[62] The Court accepted that the police honestly and reasonably believed that their actions were *Charter* compliant.[63]

Both *Saeed* and *Fearon* reveal that, where the law relating to police powers incident to arrest is unclear, an officer's conduct may be labelled good faith policing. It is important to note however that the concept of good faith policing is limited. For the purpose of clarity, it must be emphasized that negligent or reckless disregard for the *Charter* rights of an accused should never equate to good faith policing. Additionally, it is imperative that judges be cognizant of the fact that good faith policing is not determinative. The Supreme Court in *R v Mann*[64] held that a finding of good faith policing is not determinative in the overall analysis; judges must still look at all of the other relevant factors.[65]

IV. THE UNEVEN APPLICATION OF GOOD FAITH POLICING IN THE *GRANT* ANALYSIS

The research I have conducted consists of an empirical study of one hundred s. 24(2) cases from the year 2016. The methodology used will be summarized below. My research reveals two trends that are worth discussing. Firstly, negligent and reckless police conduct is sometimes being characterized as good faith policing. This is possibly due to the fact that good faith policing has never been clearly defined. Secondly, there is a strong link between the police conduct inquiry and the ultimate decision of whether to exclude or admit impugned evidence under the *Grant* framework. Put simply, the police conduct inquiry appears to be the determinative factor in the analysis. This does accord with the Supreme Court's clear instructions that all three factors of the *Grant* analysis must be balanced against one another without allowing for one factor to trump the others.[66]

The uneven and inconsistent application of good faith policing can affect a court's *Grant* analysis. This is especially dangerous when considering

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62 *Ibid* at para 93–95.

63 *Ibid*.

64 *R v Mann*, 2004 SCC 52, [2004] 3 SCR 59 [*Mann*].

65 *Ibid* at para 55.

66 *Grant*, *supra* note 2 at para 86; *Côté*, *supra* note 5 at para 48.

that the first factor in the *Grant* analysis is potentially the determinative factor. This may lead to the admission of evidence that otherwise ought to have been excluded.

A. My Research, Findings and Methodology

The objective of my research was to analyze how judges have been applying the first factor of the *Grant* analysis. My prior studies of s. 24(2) had made it clear that the first factor was an important one; I set out to research just how determinative it was in the overall analysis. Additionally, I wanted to assess how forgiving a finding of good faith policing was. In other words, I wanted to explore what the effect of a finding of good faith policing was on a judge's overall decision of whether to admit or exclude evidence.

I conducted a study of the 2016 case law where s. 24(2) was applied. I collected a sample of one hundred judicial decisions from the year 2016. These one hundred cases all included defence applications for the exclusion of evidence pursuant to s. 24(2) of the *Charter*. These cases were studied in an attempt to find trends in the law in relation to the first factor of the *Grant* analysis and the concept of good faith policing.

The method used for creating this sample was the following: on WestLaw Next Canada, I searched for cases using the search words "Section 24(2) of the *Canadian Charter of Rights and Freedoms*". I then narrowed the search by requiring that only decisions rendered after January 1st 2016 be listed. I then compiled my list based on the first one hundred cases found. The result was a list of one hundred judicial decisions from the year 2016 which have considered s. 24(2) and the *Charter* and the *Grant* analysis. The methodology used was not specialized and was used to simply compile a list of one hundred cases that could be studied from 2016. Cases range from trial level all the way to the Supreme Court. The reason for choosing a wide breadth of cases was simply to get a general view and feel for the application of s. 24(2) and its relationship with the police conduct inquiry. It is worth noting that in some of the decisions studied, the judge found that there was no *Charter* breach but completed the *Grant* analysis in case an appellate

court found that there had in fact been a *Charter* breach.[67] It is not uncommon for judges to do so.[68]

The cases were studied to firstly determine what *Charter* breach occurred. I then directed my attention to the judge's *Grant* analysis to determine whether the court excluded the evidence and how the police conduct was assessed in each case. This allowed me to study the relationship between s. 24(2) of the *Charter* and the police conduct inquiry under the *Grant* analysis. The cases studied, and the accompanying results are listed in a table attached as "Appendix A".

It is openly conceded that the research I have undertaken represents only a very small sub-set of the thousands of cases in which courts have applied s. 24(2) and the *Grant* analysis. The research I have conducted is far less comprehensive than the prior research undertaken by academics such

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67 See e.g. in my research list: *R v Beairsto,* 2016 ABQB 216, [2016] AWLD 3272; *R v Beauregard,* 2016 ABCA 37, [2016] AWLD 881; *R v Flett,* 2016 MBPC 66, 134 WCB (2d) 456; *R v Gibson,* 2016 ONCJ 732, 135 WCB (2d) 622; *R v Habib,* 2016 ABCA 190, 131 WCB (2d) 482; *R v Kading,* 2016 ONCJ 212, [2016] OJ No 1974 (QL); *R v Kosterewa,* 2016 ONSC 7231, 135 WCB (2d) 17; *R v Neill,* 2016 ONSC 4963, 134 WCB (2d) 457; *R v Prince,* 2016 ABPC 297, [2017] AWLD 520. These are some of the cases studied in which the judge found no breach but completed the *Grant* analysis.

68 The Ontario Court of Appeal has commended this practice and has stated that judges who do not find a *Charter* breach should in fact proceed to the *Grant* analysis. It serves to provide potential appellate court cases with the findings of the trial judge in relation to the *Grant* analysis. In *R v Macnab,* 2016 SKQB 61, [2016] SJ No 111 (QL), the court at paragraph 43 stated the following in relation to this practice: "The late Justice Marc Rosenberg, an eminent jurist formerly of the Ontario Court of Appeal has expressly said that trial judges who don't find a *Charter* breach should go on to performed the section 24(2) analysis. He offered the following reasons: the analysis itself may not be adopted by the appellate court, because the failure to find a breach may have distorted the analysis. But the facts are the key: if the trial judge makes the factual findings necessary to conduct a 24(2) analysis (for example, as to whether the officer was acting in good faith), then the appellate court can adopt those facts and do its own analysis. This will prevent the necessity for a new trial."

as Asselin,[69] Madden[70] and Jochelson, Huang and Murchison[71] whose greatly appreciated works have all impressively and significantly contributed to the understanding of the application of s. 24(2). My research does not purport to offer the same type of evidence. My research is smaller scale and not as comprehensive as previous empirical studies of s. 24(2), such as the ones conducted by the authors noted above. Rather, my research, on a much smaller scale, attempts to look at the interaction between s. 24(2) of the *Charter* and the police conduct inquiry.

As a point of interest, according to the 100 cases I studied, I found that in 2016 there was an overall exclusion rate of 67%.[72] This is comparable to a 70% exclusion rate found by Mike Madden in 2010,[73] a 73% exclusion rate found by Arianne Asselin in 2013,[74] and a 68% exclusion rate found by Jochelson, Huang and Murchison in 2014.[75] Speaking generally, the exclusion rate that I found is in the same range that it has been in since the release of the Supreme Court's decision in *Grant*. It is interesting to note that these rates of exclusion are relatively high when considering the fact that the drafters of s. 24(2) intended for evidence only to be excluded in limited circumstances.[76]

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69 Arianne Asselin, *The Exclusionary Rule in Canada: Trends and Future Directions* (LLM Thesis, Queen's University Faculty of Law, 2013) [unpublished], online: <https://qspace.library.queensu.ca/bitstream/handle/1974/8244/Asselin_Ariane_J_201308_LLM.pdf;jsessionid=FD51C66F9887411C66816F83710DA511?sequence=1>.

70 Mike Madden, "Empirical Data on S. 24(2) Exclusion Under *R v Grant*" (2011), 78(2) CR (6th) 278 [Madden, "Empirical Data"]; *Madden, supra* note 27.

71 Richard Jochelson, Debao Huang & Melanie J Murchison, "Empiricizing Exclusionary Remedies: A Cross Canada Study of Exclusion of Evidence Under Section 24(2) of the *Charter*, Five Years After *Grant*" (2016) 63 Crim LQ 206.

72 It is important to note that the cases in which no *Charter* breaches were found were not considered in my overall determination of the exclusion rate. These cases were not considered in the exclusion rate analysis because it was a guarantee that the evidence would not be excluded since no *Charter* breach was found. In other words, it would have been redundant to include those cases in the exclusion rate analysis because there was no possibility of exclusion – there was no breach found and thus there was no possibility for exclusion.

73 Madden, "Empirical Data," *supra* note 70.

74 Asselin, *supra* note 69 at para 99.

75 Jochelson, Huang & Murchison, *supra* note 71.

76 Stratas, *supra* note 12 at 279 where he cites the Special Joint Committee on the

B. An Overemphasis on Police Conduct

After surveying 100 cases from the year 2016, I began to look at the relationship between the rates of exclusion and the characterization of the police conduct. I wanted to see if judges tended to exclude evidence once the police conduct was placed on the more serious end of the spectrum, and on the other hand, if judges would admit evidence when the police conduct was placed on the lower end of the spectrum. My research showed that when judges characterized the conduct of the police as negligent, reckless, willful, blatant or flagrant, there was a 97% exclusion rate. Where courts characterized the police breach as a minor breach or a breach committed in good faith, there was an 86% rate of admission.

There appears to be a strong link between the police conduct inquiry and the decision of whether to exclude or admit evidence. If a judge labels the conduct of a police officer as being on the more serious end of the spectrum, there is a very high likelihood that the evidence will be excluded. If the conduct of the officer is labeled as being on the lower end of the spectrum, where the breach was minor, inadvertent or committed in good faith, then there is a strong chance that the evidence will be admitted. Naturally, this suggests that there is a strong link between the labeling of the police conduct and the decision of whether to admit or exclude evidence.

Another point worth noting is that, in my research, judges often did not place the conduct of the officers on a spectrum as required by *Grant*.[77] Instead of placing the conduct on a spectrum, judges seemed to have a tendency to place the conduct of the officers into two separate boxes. Each box sits at separate ends of the spectrum. There seldom appears to be a middle point. If the conduct of the officer was characterized as minor, inadvertent or committed in good faith, it is placed in the box that favours admission. If the conduct is negligent, reckless, willful or blatant, it is placed in the box that favours exclusion. Once the conduct was placed into one of the boxes, there was often, as noted above, a direct relationship between the conduct of the police officer and the overall outcome of whether to exclude the evidence.

Constitution of Canada, *Proceedings*, 32nd Parl, 1st Sess, No 7 (1980–1981) at 99–100 (E Ewaschuk).

77 *Grant*, *supra* note 2 at para 74.

The Supreme Court in *Grant* has required that the conduct of the officer be placed on a spectrum, not into a box.[78] Failing to properly place the police conduct on a spectrum takes away from the judge's overall balancing of the three *Grant* factors. When the conduct is placed in a box as being either serious or minor, this incidentally precludes the judge from properly balancing all three factors. This is akin to what took place under the *Collins/Stillman* framework. McLachlin C.J. and Charron J. acknowledged that the *Collins/Stillman* framework put the "all the circumstances approach" into a "straightjacket."[79] The Court was critical of the fact that the trial fairness inquiry took away from a judge's ability to properly consider all of the factors under the framework. The police conduct inquiry seems to have had the same effect. The police conduct inquiry seems to have put the "all the circumstances approach" into a "straightjacket" due to the fact that it has become the determinative factor.

It is worth noting that throughout my research I found it common for judges, in their written judgments, to spend a majority of their s. 24(2) analysis writing on the first factor of the *Grant* analysis. For example, in *R v Khandal*,[80] the presiding judge of the Ontario Court of Justice spent 15 paragraphs writing on the first factor of the *Grant* analysis. He then offered 3 paragraphs on the second factor, and 1 paragraph on the third factor.[81] In *R v Leung*[82] the judge of the British Columbia Provincial Court spent 11 paragraphs of his judgment addressing the first factor of the *Grant* analysis. He then wrote one paragraph on the second factor and wrote one paragraph on the third factor.[83] This was a recurring theme throughout my research. To be clear, this did not happen in every case, but it happened often enough that it is worth mentioning.

Admittedly, the conclusion I have arrived at through my research is perhaps expected. It is logical that serious police breaches often result in

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78 *Ibid.*

79 *Ibid* at 101. The Court warned that the conscriptive evidence rule from *Stillman* restricted judges from being able to properly consider all of the subsequent factors in the *Collins/Stillman* framework. The 24(2) analysis was being restricted when the impugned evidence was conscriptive.

80 *R v Khandal*, 2016 ONCJ 446, 131 WCB (2d) 466.

81 *Ibid.*

82 *R v Leung*, 2016 BCPC 198, 131 WCB (2d) 582.

83 *Ibid* at paras 53–66.

exclusion and that minor police breaches result in admission. However, the strong link between the first factor in the *Grant* analysis and the overall decision of whether to exclude or admit evidence appears to create a one-step test. Put simply, s. 24(2) seems to revolve primarily around the police conduct inquiry. However, courts have been instructed by the Supreme Court to consider all three factors together – not simply just the police conduct inquiry.[84] Therefore, the police conduct inquiry seems to have put the entire *Grant* analysis into a straightjacket. Relying too heavily on the first factor may lead some courts to fail to recognize that even minor or good faith policing breaches can still amount to a serious breach on the rights of an accused. These serious breaches may warrant exclusion even though the officer committed a minor or good faith breach.

It is helpful to contrast the differing opinions Karakatsanis J. and Abella J. in *Saeed*. In *Saeed*, Karakatsanis J. appeared to rely on the first factor of the *Grant* analysis. The officer in this case conducted a genital swab on the accused incident to arrest. Karakatsanis J., in her concurring opinion, found that the police had breached s. 8 of the *Charter*. Karakatsanis J. found that the seriousness of the police conduct was lessened due to the fact that there was confusion in the law.[85] Karakatsanis J. would have admitted the evidence.[86]

In *Saeed*, Abella J. issued a strong dissent.[87] Abella J. firstly disagreed with the finding of good faith.[88] She found it unacceptable that the officers performed a genital swab without the consent of the accused or a warrant. She further argued that this was a profound infringement of the most serious nature on the bodily integrity of the accused.[89] Abella J. thoughtfully considered the impact of the search on the *Charter* rights of the accused. Abella J. would have excluded the evidence.[90] I would emphasize that Abella J. appears to have fully considered the impact of the breach on the rights of

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84 *Grant*, *supra* note 2 at para 86; *Côté*, *supra* note 5 at para 48.

85 *Saeed*, *supra* note 55 at para 126.

86 *Ibid* at para 129.

87 *Ibid* at para 131–168.

88 *Ibid* at para 149.

89 *Ibid* at para 150–153.

90 *Ibid* at para 168.

the accused. The contrasting opinions in *Saeed* are illustrative of the issue this article attempts to identify.

In *R v Harflett*,[91] the police officer involved took possession of the accused's vehicle after he had found that the accused was driving with a suspended license. The officer searched the vehicle without reasonable grounds to do so. He found a large amount of marijuana. At trial, the trial judge admitted the evidence. The trial judge held that there was no *Charter* violation, yet conducted a s. 24(2) analysis as a means of demonstrating that, had he found a breach, the evidence would not have been excluded. It was accepted by the trial judge that the police officer was acting in good faith and that he had honestly believed he had authority to search the vehicle.

The Ontario Court of Appeal intervened, determined there was a breach and that the evidence ought to be excluded. The Court of Appeal allowed the appeal, excluded the evidence and acquitted the accused.[92] The Ontario Court of Appeal accepted the trial judge's finding that the officer was acting in good faith.[93] However, they emphasized that the officer's conduct nonetheless constituted a serious breach on the *Charter* rights of the accused and that the officer had shown a pattern of abuse in the past.[94] The Court found that, although the search of the appellant's vehicle was minimally intrusive, it was nonetheless a serious breach due to the fact that there were no grounds to search the vehicle. They held that the trial judge incorrectly found that the impact of the breach on the rights of the accused was minimal.[95] Respectfully, the Ontario Court of Appeal seems to be correct in deciding to exclude the evidence and not condoning a warrantless search. The example in *Harlfett* shows the difference it can make when all three factors from the *Grant* analysis are considered holistically.

The examples above simply serve to illustrate that in certain cases, the police conduct inquiry can be determinative without full consideration of the impact of the breach on the rights of the accused. This is at odds with the directives given by the Supreme Court which require that all factors be balanced against one another without allowing for one factor to be

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91 *R v Harflett*, 2016 ONCA 248, 336 CCC (3d) 102 [*Harflett*].

92 *Ibid* at para 58.

93 *Ibid* at para 44–45.

94 *Ibid* at para 40–45.

95 *Ibid* at para 56.

determinative over the other.[96] As seen in *Harflett*,[97] when judges properly consider all three factors of the analysis, the outcome of the decision can be much different. The words of Lambert J.A. of the British Columbia Court of Appeal are appropriate to depict the point I am making:

> "With respect, I do not think that good faith, in itself, important though it is, outweighs all other factors to the point where none of them need be considered. And I do not think the view that good faith does outweigh all the other factors can be considered to have survived the decisions of the Supreme Court."[98]

It is also appropriate to consider a statement from the Supreme Court in *R v Mann*[99] where Iacobucci J. stated, "good faith is but one factor in the analysis and must be considered alongside other factors."[100] In essence, this article is making the same point as the two preceding passages. Although the concept of good faith policing is valuable, it should never be determinative; good faith policing should never outweigh the other *Grant* factors.

C. The Inconsistent and Uneven Application of Good Faith Policing

By way of review, I have explained that good faith policing arises when the police honestly and reasonably believed that their actions were lawful. As noted, negligence and reckless police conduct should not be characterized as good faith policing. [101] Unfortunately, apart from this, the Supreme Court has never clearly defined the concept of good faith policing. As noted, much of the recent Supreme Court jurisprudence seems to emphasize that good faith policing arises when there is confusion in the law that has led the police to honestly and reasonably believe that their actions were lawful.[102] However, the undefined scope of good faith policing is unfavourable and has led to inconsistent applications of good faith

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96 *Grant*, *supra* note 2 at para 86; *Côté*, *supra* note 5 at para 48.

97 *Harflett*, *supra* note 91.

98 *R v Gladstone* (1985), 22 CCC (3d) 151 at 156, [1985] 6 WWR 504.

99 *Mann*, *supra* note 64.

100 *Ibid* at para 55.

101 *Grant*, *supra* note 2 at 75.

102 See e.g. *Cole*, *supra* note 55; *Aucoin*, *supra* note 55; *Vu*, *supra* note 55; *Spencer*, *supra* note 55; *Fearon*, *supra* note 55; *Saeed*, *supra* note 55.

policing.[103] Some of the decisions studied suggest that courts tend to inconsistently and unevenly characterize police conduct as good faith policing.

In *R v Wegner*[104] a police officer noticed a suspicious looking man in a shopping mall. The officer found the man to be suspicious given that he was "pacing back and forth in front of some stores."[105] The man entered a bathroom stall in the mall's washroom. The officer, based on a simple hunch, followed the man into the washroom. The officer announced himself and opened the stall door. He found the accused ingesting cocaine.[106] The accused brought an application to have the evidence excluded. The judge agreed that this amounted to a breach of the accused's right against unreasonable search and seizure. Nonetheless, the judge found that the officer was acting in good faith and admitted the evidence.[107]

In *Wegner*, the judge, for the Ontario Court of Justice, found that the officer was acting in good faith by pursuing a "low level" investigation after he became suspicious of the accused "pacing back and forth in front of stores."[108] There are doubts about whether the officer's conduct in this scenario should be captured by the concept of good faith policing. The officer was acting on a simple hunch and committed a *Charter* breach. The officer was aware, or ought to have been aware, that he did not have the legal authority to open the door to the bathroom stall based on a simple suspicious hunch, yet he did. The officer did not have legal grounds to enter the bathroom stall and his failure to recognize that may be characterized as negligent. Although this breach is understandably a minor breach, there are concerns about whether it should be characterized as a good faith breach.

The point being made is that certain conduct is being forgiven as good faith policing when it should perhaps fall towards the more serious end of the police conduct spectrum. Consequently, conduct such as the conduct identified in the cases above is being captured under the concept of good faith policing and favours admission. This can be problematic if the conduct

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103 Roach, *supra* note 6 at 10-58.1.

104 *R v Wegner*, 2016 ONCJ 228, 130 WCB (2d) 42.

105 *Ibid* at para 2.

106 *Ibid* at paras 2–5.

107 *Ibid* at paras 22–25.

108 *Ibid* at para 22.

of the officer should actually be characterized as a more serious breach, and not as a good faith breach.

To be clear, my research has not shown that courts are always misapplying good faith policing. My research has simply shown that some police conduct, which appears negligent or reckless, is being characterized as good faith policing. There appears to be an uneven application of the concept of good faith policing which leads to inconsistent results. It is possible that this is due to the lack of clarity surrounding the definition of good faith policing and the types of conduct it should be capturing.

D. The Undermining of *Charter* Values

As Iacobucci J. stated in *R v Hall*,[109] judges across this country must "staunchly uphold constitutional standards."[110] The police conduct inquiry has arguably become the determinative factor in the overall decision of whether to exclude evidence. This can be problematic when the concept of good faith policing, which plays a significant role in the police conduct inquiry, has no clear definition and is receiving uneven and inconsistent application. There are concerns that this will undermine s. 24(2) of the *Charter* and the remedy it offers to all persons whose rights have been infringed.

Section 24(2) is a remedial provision that provides a remedy to an accused when their *Charter* rights have been breached.[111] It is therefore "cold comfort" to an accused if his/her *Charter* rights are severely breached but he/she receives no remedy simply because the officer was found to be acting in good faith. As noted by Sopinka J. in *R v Hebert*, it is difficult to understand how good faith policing can cure a serious breach.[112] Additionally, as noted by Iacobucci J., "the fact that the police thought they were acting reasonably is cold comfort to an accused if their actions result in a violation of his or her rights."[113] An accused is not comforted by the fact that the officer honestly and reasonably believed they were acting lawfully. The accused's rights have still been infringed, sometimes severely,

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109 *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309.

110 *Ibid* at para 128; see also *Genest*, *supra* note 50 at para 87; *Kokesch*, *supra* note 50.

111 *Collins*, *supra* note 20 at para 19.

112 *R v Hebert*, [1990] 2 SCR 151, [1990] SCJ No 64 (QL).

113 *R v Elshaw*, [1991] 3 SCR 24 at 18, 59 BCLR (2d) 143.

and the impact of that infringement must be fully taken into account. The trend in the law currently favours the admission of evidence when the police were acting in good faith. This trend does not appear to be consistent with s. 24(2). It is also especially dangerous if the concept of good faith policing is being applied inconsistently and has the potential to capture a very broad scope of conduct.

To be clear, there are many scenarios in which good faith policing is found and the admission of the impugned evidence is entirely warranted. However, when deciding to admit the evidence, careful attention must be paid to the impact of the breach on the rights of the accused. Good faith on the part of the police must not overwhelm the analysis. This trend presents the risk that *Charter* values may be undermined.

It is also important to note that the inconsistent and uneven application of the concept of good faith policing has increased the chances that negligent or reckless police conduct will be characterized as good faith policing. Coupling this with the fact that the concept of good faith policing is arguably the determinative factor, there is an increased chance that evidence that should otherwise be excluded will be admitted. The point being made is that the confusion in relation to the concept of good faith policing and the overreliance on the first factor of the *Grant* analysis has led to the admission of evidence that perhaps should have been excluded. The result is that, in some cases, *Charter* rights are being undermined and not properly protected.

V. RECOMMENDATIONS AND CONCLUSION

The concept of good faith policing lacks a clear definition. In fact, in *Grant*, the limited guidance given by the Court is that "negligence or good faith cannot be equated with good faith."[114] It is still alarming that the Supreme Court has never truly defined the concept of good faith policing. This is alarming when considering it plays such a vital role in the *Grant* analysis. The lack of clarity has led to inconsistent and uneven applications of good faith policing which has the potential to capture negligent and reckless breaches. In other words, good faith policing is being applied in a wide variety of circumstances due to the lack of clarity given to its definition. Coughlan articulates the versatility in the application of good faith policing:

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[114] *Grant*, *supra* note 2at para 75.

> "Good faith has always been a flexible concept within s. 24(2), and courts have applied it in a number of ways. Some cases have treated good faith as the mere absence of bad faith, and have therefore held either that a lack of malice is a factor favouring admission, or have held that a failure to act in good faith is not automatically bad faith, and therefore, is not necessarily a factor favouring exclusion. Similarly, there has been confusion over whether bad faith requires a conscious decision by police to ignore the limits on their powers, or whether simply ignorance of the limits of those powers is sufficient"[115]

This passage from Coughlan suggests that courts have not applied good faith policing consistently. Rather, it has been applied in a "number of ways." This lack of clarity is problematic. It is important for the Supreme Court to give Canadian judges and lawyers a definitive statement on the concept of good faith policing. The scope and limits of good faith policing must be defined. This is imperative given that it plays a vital role in the police conduct inquiry. This will help judges, lawyers and police understand what types of conduct should, and should not be captured by good faith policing. Judges and lawyers would have a clear understanding of arguably the most important aspect of the police conduct inquiry under the *Grant* analysis.

A finding of good faith policing appears to have a direct bearing on the admission or exclusion of evidence. Without a clear definition of good faith policing, this may lead to the admission of evidence that otherwise ought to have been excluded. Therefore, when courts admit evidence based on good faith policing, Canadians must have confidence that they are doing so based on a proper characterization of the police conduct. Anything less would greatly undermine public confidence in the administration of justice. In order to maintain this confidence, good faith policing must be given a clear definition to ensure that negligent and reckless breaches are not being rewarded by a good faith characterization.

Section 24(2) serves to protect the rights of all Canadians and provides a significant remedy if those rights have been breached. Parliament chose to entrench this provision in the *Charter*. A clear definition of the concept of good faith policing may help ensure that s. 24(2) is properly applied, given that good faith policing plays such a vital role in the *Grant* analysis. As Chief Justice John Marshall of the Supreme Court of the United States explained in 1803, there is no such thing as a right without a remedy.[116] In Canada, s.

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115 Coughlan, *supra* note 6.

116 *Marbury v Madison*, 5 US 137 (1803).

24(2) provides a remedy for those whose rights have been infringed. It is therefore imperative that s. 24(2) be applied properly so that it remains a meaningful remedy.

APPENDIX A

No.	CASE NAME / CITATION	*CHARTER* BREACH	EXCLUSION OR ADMISSION
1	R v Ahmad 2016 ONCJ 704	s.10(b)	Admission
2	R v Armstrong 2016 MBQB 134	s. 8 / s.9	Exclusion
3	R v Artis 2016 ONSC 2050	s.8	Admission
4	R v Azarnush 2016 ONCJ 355	s. 8 / s.9 / s.10(b)	Exclusion
5	R v Beairsto 2016 ABQB 216	No breach found	Admission
6	R v Beauregard 2016 ABCA 37	No breach found	Admission
7	R v Biellie 2016 ONSC 6866	s.10(a) / s.10(b)	Admission
8	R v Bullen 2016 ONSC 7875	s.8	Admission
9	R v Burke 2017 ONSC 737	s.8	Exclusion
10	R v Cameron 2016 SKPC 2016	s. 8	Exclusion
11	R v Carreau 2016 ONCJ 700	s.8	Admission
12	R v Chanmany 2016 ONSC 3092	s.10(b)	Exclusion
13	R v Clarke 2016 BCSC 1323	s.8	Exclusion
14	R v Coderre 2016 ONCA 276	s.8	Admission

15	R v Coutu 2016 MBQB 7	s.10(b)	Exclusion
16	R v Craig 2016 BCCA 154	s.8	Admission
17	R v D'Souza 2016 ONSC 5855	s.8 /s.10(a) / s.10(b)	Exclusion
18	R v Dadmand 2016 BCSC 877	s.8	Admission
19	R v Densmore 2016 YKTC 65	s.10(b)	Exclusion
20	R v Doonanco 2016 ABQB 612	s.8	Exclusion
21	R v Ducherer 2016 SKQB 110	s.8	Admission
22	R v Eastwood 2016 ONCJ 583	s.8	Exclusion
23	R v Elzain 2016 ONCJ 50	s.10(b)	Admission
24	R v Ferreira 2016 ONSC 2039	s.8	Exclusion
25	R v Flett 2016 MBPC 66	No breach found	Admission
26	R v Gayle 2016 ONSC 3464	s. 8 / s.9	Admission
27	R v Giampaolo 2016 CarswellOnt 19041	s.7 / s.8 / s.9 / s.10(b)	Exclusion
28	R v Gibson 2016 ONCJ 732	No breach found	Admission
29	R v Gunnarson 2016 NLTD(G) 191	s.9	Exclusion
30	R v Habib 2016 ABCA 190	No breach found	Admission
31	R v Hall 2016 ONCJ 696	s.9 / s.10(b)	Exclusion

32	R v Harflett 2016 ONCA 248	s.8	Exclusion
33	R v Harper 2016 BCPC 254	s.9	Exclusion
34	R v Hiebert 2016 MBQB 170	s.8	Admission
35	R v Hussein 2016 ABQB 703	s.10(b)	Admission
36	R v James 2016 ONSC 4086	s.8	Exclusion
37	R v Kading 2016 ONCJ 212	No breach found	Admission
38	R v Khandal 2016 ONCJ 446	s.10(b)	Exclusion
39	R v King 2016 ABCA 364	s.8	Admission
40	R v King 2016 NLTD(G) 45	s.8	Exclusion
41	R v Kosterewa 2016 ONSC 7231	No breach found	Admission
42	R v Lacroix 2016 ONSC 3052	s.9	Admission
43	R v Leaf 2016 ONSC 1974	s.8 / s.9 / s.10(a)	Exclusion
44	R v Lecuyer 2016 NLTD(G) 123	s.8 / s.9	Exclusion
45	R v Leung 2016 BCPC 198	s.8	Exclusion
46	R v Lorenzo 2016 ONCJ 634	s.9	Exclusion
47	R v MacDonald 2016 ABQB 98	s.8 / s.9	Exclusion
48	R v Marek 2016 ABQB 18	s.8	Exclusion

49	R v Marks 2016 ABPC 290	s.10(b)	Admission
50	R v Martineau 2016 ABPC 195	s.8	Exclusion
51	R v Masse 2016 SKPC 148	s.8 / s.10(b)	Exclusion
52	R v Mawad 2016 ONSC 7589	s.8	Admission
53	R v Mazza 2016 ONSC 5581	s.8 /s.9 / s.10(b)	Exclusion
54	R v McCann 2016 ONSC 6057	s.10(b)	Admission
55	R v McCormack 2017 CarswellNfld 6	s.8 / s.9	Exclusion
56	R v McMahon 2016 SKPC 172	s.8	Exclusion
57	R v Miller-Williams 2016 ONCJ 524	s.8 / s.9 / s.10	Exclusion
58	R v Moore 2016 ONCA 964	s.10(b)	Exclusion
59	R v Nascimento-Pires 2016 ONCJ 143	s.8	Exclusion
60	R v Neill 2016 ONSC 4963	No breach found	Admission
61	R v Nguyen 2016 ONSC 8048	s.8 / s.9	Exclusion
62	R v Nithiyananthaselvan 2016 ONCJ 426	s.8 / s.9 / s.10(a) / s.10(b)	Exclusion
63	R v Noftball 2016 NLCA 48	s.8	Admission
64	R v Ohenhen 2016 ONSC 5782	s.8 / s.9 / s.10(b)	Exclusion

65	R v Olive 2016 ONCJ 558	s. 8 / s.9 / s.10(b)	Exclusion
66	R v Pattinson 2016 ONSC 1193	s.10(b)	Admission
67	R v Paxton 2016 ONSC 2906	s.8	Admission
68	R v Persaud 2016 ONSC 8110	s.8	Exclusion
69	R v Poirier 2016 ONCA 582	s.7 / s.8	Exclusion
70	R v Primeau 2016 SKPC 134	s.8 / s.9	Exclusion
71	R v Prince 2016 ABPC 297	No breach found	Admission
72	R v Rahman 2016 ONCJ 718	s.8 / s.9	Exclusion
73	R v Randawa 2016 BCPC 263	s.8	Exclusion
74	R v Ranglin 2016 ONSC 3972	s.8	Admission
75	R v Reddemann 2016 BCSC 442	s.10(b)	Exclusion
76	R v Richards 2016 ABQB 176	s.8	Admission
77	R v Richards 2016 ONSC 3556	s.10(b)	Exclusion
78	R v Saeed 2016 SCC 24	s.8	Admission
79	R v Seguin 2016 ONCJ 441	s.9 / s.10(a) / s.10(b)	Exclusion
80	R v Singh 2016 ONCJ 386	s.2(a)	Exclusion
81	R v Singh 2016 ONSC 1144	s.8	Admission

82	R v Squires 2016 NLCA 54	s.8 / s.9	Exclusion
83	R v Stockton 2016 ONSC 1408	No breach found	Admission
84	R v Street 2016 SKPC 7	s.9 / s.10(a)	Exclusion
85	R v Suteau 2016 SKPC 79	s.9 / s.10(a)	Exclusion
86	R v Tetrault 2016 ABQB 373	s.8 / s.9	Admission
87	R v Thompson 2016 CarswellOnt 6360	s.7 / s.8 / s.9 / s.10(a)	Exclusion
88	R v Tieu 2016 ABQB 344	s.10(b)	Exclusion
89	R v Topper 2016 ONCJ 716	s.8 / s.9	Exclusion
90	R v Walsh 2016 CarswellNfld 69	s.10(a) / s.10(b)	Exclusion
91	R v Wasilewski 2016 SKCA 112	s.8	Admission
92	R v Wawrykiewicz 2016 ONSC 569	s.8	Admission
93	R v Wegner 2016 ONCJ 228	s.8	Admission
94	R v Whipple 2016 ABCA 232	No breach found	Admission
95	R v Whitton 2016 BCSC 2518	s.8	Exclusion
96	R v Wieczorek 2016 ONCJ 414	No breach found	Admission
97	R v Williams 2016 SKPC 39	s.9 / s.10(b)	Exclusion
98	R v Williams 2016 SKPC 69	s.10(b)	Exclusion

99	R v Wilson 2016 MBPC 26	s.10(b)	Exclusion
100	R v Wiseman 2016 NLTD(G) 180	s.8 / s.9	Exclusion